No. 83-1576 and No. 83-1584



# In the Supreme Court of the United States

**October Term, 1983**

EUGENE R. SUTTON, *et al.*,
*Petitioners,*

v.

WEIRTON STEEL DIVISION OF
NATIONAL STEEL CORPORATION, *et al.*,
*Respondents.*

EDWARD DHAYER, *et al.*,
*Petitioners,*

v.

WEIRTON STEEL DIVISION OF
NATIONAL STEEL CORPORATION, *et al.*,
*Respondents.*

GERALD W. BRUNNER, *et al.*,
*Petitioners,*

v.

NATIONAL STEEL CORPORATION, *et al.*,
*Respondents.*

ON PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

## Brief In Opposition To Petitions For Writs Of Certiorari

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National Steel Corporation
Retirement Program

## COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Are the fiduciary standards of the Employee Retirement Income Security Act of 1974 (ERISA), Section 404(a)(1), 29 U.S.C. §1104(a)(1), applicable for reviewing the actions of an employer which, in negotiating with representatives of employees purchasing a plant as an ongoing operation, obtains agreement from union-represented employees by their vote and from non-union employees by agreement with their representatives, to adopt amendments to existing pension plans, severance policies, pension agreements and collective bargaining agreements, for the purpose of clarifying such plans, policies and agreements to reflect the parties' understanding that the sale would not be interpreted as triggering any employee's eligibility for special pension and severance benefits which are contingent upon loss of employment resulting from a permanent shutdown of the plant and are not vested, accrued, or non-forfeitable under the terms ERISA or plan documents?

2. Does an employer engage in a prohibited transaction within the meaning of Section 406(a) and (b) of ERISA, 29 U.S.C. §1106(a) and (b), when, in negotiating with representatives of employees purchasing a plant as an ongoing operation, the employer obtains agreement from union-represented employees by their vote and from non-union employees by agreement with their representatives, to adopt amendments to existing pension plans, severance policies, pension agreements and collective bargaining agreements, for the purpose of clarifying such plans, policies and agreements to reflect the understanding of the parties that the sale of the plant to such employees would not be interpreted as triggering any employee's eligibility for special pension and severance benefits which are con-

tingent upon loss of employment resulting from permanent shutdown of the plant and are not vested, accrued or non-forfeitable under the terms of ERISA or plan documents?

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No. 83-1576 and No. 83-1584

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**Brief In Opposition To Petitions
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Respondents National Steel Corporation and the National Steel Corporation Retirement Program submit this brief in opposition to the Petitions for Writs of Certiorari filed by the appellants in the actions captioned *Sutton, et al. v. Weirton Steel Division of National Steel Corporation, et al.* and *Dhayer, et al. v. Weirton Steel Division of National Steel Corporation, et al.* in No. 83-1576 and *Brunner, et al. v. National Steel Corporation, et al.* in No. 83-1584.[1]

## COUNTERSTATEMENT OF THE CASE

These cases arise out of the agreement of National Steel Corporation to sell substantially all of the assets of its Weirton Steel Division (hereinafter the "Division") as an ongoing steelmaking operation to a newly formed company known as the Weirton Steel Corporation. The stockholders of the Weirton Steel Corporation are its employees, who acquired ownership of the stock through an Employee Stock Ownership Plan (ESOP). The closing of the sale occurred January 11, 1984. The assets of the Division are now owned and operated by the Weirton Steel Corporation.

The Petitioners in *Sutton* and *Brunner* were employees of the Division who are represented for purposes of collective bargaining by either the Independent Steelworkers Union or the Independent Guard Union (hereinafter referred to jointly as the "Union"). The Petitioners in *Dhayer* were employees of the Division who were not members of, or represented by, any labor organization.

Prior to the sale of the Division, Division employees participated in a pension plan which covered union and

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[1]The appellants in the *Brunner*, *Sutton* and *Dhayer* actions are collectively referred to herein as "Petitioners."

non-union Division employees, as well as other groups of employees within National. In addition, National provided Division employees with certain severance benefits pursuant to either corporate policy or collective bargaining agreements. The pension plan gave National authority to appoint a board of administration to administer the plan. It has not been disputed that this authority renders National a fiduciary under ERISA with respect to the pension plan.

The Petitioners challenge certain terms of the negotiated agreements leading to the sale of the plant. Those agreements required the amendment of pension plans and severance policies to state that the sale of assets would not be interpreted to constitute a permanent shutdown of the plant resulting in loss of employment so as to trigger eligibility for contingent pension benefits (referred to as "70/80" and "Rule-of-65" pensions) and severance pay.[2] Petitioners argue that by negotiating such clarifying amendments, National Steel Corporation violated its fiduciary duties under ERISA and engaged in a transaction prohibited by ERISA.

Shortly after filing their complaints, Petitioners in *Sutton* and *Brunner* moved for temporary restraining orders and, later, for preliminary injunctions to enjoin the sale of Division assets. The district court conducted three days of hearings on Petitioners' Motions for Preliminary Injunctions. Witnesses who testified included Walter Bish, President of the Union and a Co-Chairman of the Weirton Joint Study Committee, Inc., and Carl Valdeserri, a Vice-Presi-

[2]As will be discussed more fully below, the 70/80 and Rule-of-65 pensions and the severance benefits at issue, to the extent relevant to this litigation, were payable only in the event of the permanent shutdown of the Division or a portion thereof and consequent loss of employment.

dent of Weirton Steel Division and also a Co-Chairman of the Weirton Joint Study Committee, Inc. Subsequently, the district court denied Petitioner's motions for injunctive relief.

National Steel Corporation thereafter moved for summary judgment as to certain claims based upon the evidence presented at the injunction hearings, the pleadings, and the affidavits submitted by the parties. The well pleaded facts of the complaints, together with the uncontroverted evidence established at the preliminary injunction hearings, were considered by the district court in determining whether an issue of material fact was in dispute so as to preclude summary judgment. The district court granted summary judgment as to certain claims, which judgments were affirmed by the court of appeals.

The following description of events presents the counterstatement of the case by National Steel Corporation and the National Steel Corporation Retirement Program:

National Steel Corporation announced on March 2, 1982 that it would no longer make significant capital investment in its Division facilities and that those facilities would be "downsized" over a period of time with a resulting reduction in the level of employment to between 1,200 and 2,000 employees by the late 1980's, as compared with approximately 7,000 active employees in April, 1983. As an alternative, National's management indicated a willingness to find a buyer for the Division or to explore the possibility of an employee purchase of the facility. *Sutton* Appendix at 18a.

Members of management of the Division and the Union formed the Weirton Joint Study Committee, Inc. (hereinafter "Committee") to explore the possibilities for

an employee purchase of the facility. The Committee's Board of Directors comprised five representatives of Division management, twenty-one representatives of the Independent Steelworkers Union and three representatives of the Independent Guard Union. *Sutton* Appendix at 18a-19a. The union members of the Board represented the interests of their memberships; the management members of the Board represented the interests of non-union employees. The Committee raised funds and, through a competitive selection process, hired various experts as consultants, including pension experts, financial experts and legal experts, to advise and represent the Committee in its negotiations with National.[3] *Sutton* Appendix at 19a. The Committee as a whole guided the commercial aspects of the negotiations and structured the substance of the Employee Stock Ownership Plan.

In order to implement the sale, each union separately negotiated with National concerning the effects of the sale on its existing labor, pension and benefits agreements with National, and the results of those negotiations had to be ratified by vote of union members. *Sutton* Appendix at 20a.

The district court, based on uncontroverted credible evidence introduced at the hearings on motions for preliminary injunctions filed in the *Sutton* and *Brunner* actions, found that the Committee acted on the basis of independent expert advice in its dealings with National regarding the sale and that Petitioners had failed to raise a genuine issue of material fact as to its allegation that the Committee was either controlled by National or used by National

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[3]These experts included Lazard Freres & Company, McKinsey & Company, and the law firm of Willkie Farr and Gallagher.

as a sham to further National's self-interests.[4] *Sutton* Appendix at 28a.

After a year of negotiations between counsel for the Committee and representatives of National, an Agreement in Principle regarding the sale was reached March 11, 1983. The Agreement in Principle was subject to further negotiations toward a definitive Agreement of Sale. It was also contingent upon National's obtaining agreement from the Union to adopt certain clarifying amendments to the existing Union Pension Agreements regarding 70/80 and Rule-of-65 pension benefits, as well as to the existing severance pay provisions of the Union contracts. The Agreement in Principle required identical clarifying amendments to be made to the salaried pension plan and salaried severance pay policy applicable to National's non-union employees.

National would not agree to sell the Division if the sale could be interpreted to require it to pay the aforementioned pension and severance benefits which, by their own terms, were conditioned upon the occurrence of a permanent shutdown of the plant and resulting termination of

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[4]Because Petitioners' arguments herein, as well as below, depend heavily upon the assertion that the Committee was nothing more than an instrument under National's control, it is important to note that the contrary findings of the district court were based upon its review of the evidence presented by plaintiffs themselves on this issue at the preliminary injunction hearings. This finding was independently supported by the Office of the General Counsel for the National Labor Relations Board, which refused to issue unfair labor practice complaints based upon charges filed against both National and the Union, alleging that National unlawfully dominated the Union by reason of the inclusion of Division management representatives on the Committee and alleging further that the Union had relinquished its exclusive representative status under the National Labor Relations Act by participating on the Committee or by negotiating as Committee participants with respect to the terms of a sale. *See* Appendix A of this Brief.

employment. The cost of paying such contingent benefits would make the sale economically prohibitive for National. A sale in accordance with the other terms negotiated with the Committee would have been unacceptable to National if there remained any possibility that the sale of the Division as an ongoing operation would be interpreted as triggering eligibility for these costly contingent benefits.

The 70/80 and Rule-of-65 pension benefits are payable before normal retirement age upon the occurrence of specified contingencies resulting in a permanent loss of employment, e.g., at the time of a permanent shutdown of a plant or at the end of a period of layoff caused by a permanent shutdown, and include both (a) a regular pension benefit based on years of service and (b) a $400 monthly supplemental payment until age 62. *Sutton* Appendix at 30a-31a. Because of their contingent nature, they are not funded by periodic payments to the trust of the Plan, as are vested pension benefits.

The severance pay provisions are not part of the pension plan. They exist either as part of the collective bargaining agreements applicable to union employees or as a corporate severance policy applicable to non-union employees. Like the contingent pension benefits described above, eligibility for severance benefits is contingent upon a loss of employment caused by a permanent shutdown of the plant or job elimination. *Sutton* Appendix at 45a, 74a. Severance payments are not funded but must be paid from the corporate treasury.

Ultimately, therefore, as part of the negotiations resulting in the sale of the facility, National made the following agreements concerning pension and severance pay with the Committee (and, subsequently, with Weirton Steel Corporation) and with the Union:

1. National retained all responsibility for pension benefits accrued through April 30, 1983 by Weirton participants under National's pension plan. National was required to establish a new pension plan covering Weirton retirees and employees who formerly participated in National's pension plan and to segregate and place in a separate trust such pension plan assets as would properly be allocable to those retirees and employees, in accordance with the allocation formula of ERISA §4044, 29 U.S.C. §1344. No assets in the fund were to be returned to National. *Sutton* Appendix at 32a-33a.

2. The accrued benefits of all Division employees, even those who at the time of transfer of ownership would lack the requisite years of service under National's pension plan, were to be fully vested, *i.e.*, made non-forfeitable. Moreover, National agreed to continue to credit future service with the Weirton Steel Corporation for eligibility purposes under the retirement plan maintained by National for the former Division employees. *Sutton* Appendix at 4a. Thus, employees who had earned, for example, 25 years of service under the National plan prior to the sale and who earn an additional five years of service by continuing to work for the Weirton Steel Corporation may, at the end of such additional five years, elect to retire with a "30 year" pension benefit prior to normal retirement age. Upon such retirement, National's fund for Division employees would pay 25/30ths of the 30 year retirement benefit, computed on the basis of the employee's earnings and service while employed by National. The Weirton Steel Corporation Plan would pay the remaining 5/30ths of the pension benefit.

3. National agreed to a five year "safety net" provision for possible payment of 70/80 and Rule-of-65 retirement benefits. *Sutton* Appendix at 37a. Under this provision, if

Weirton Steel Corporation permanently shuts down the Weirton facility within five years and if its available corporate assets, together with its pension fund, are insufficient to pay the 70/80 and Rule-of-65 pension benefits provided under its own pension plan (*see* p. 9, *infra*), National Steel Corporation (or in certain circumstances, its parent corporation) would be obligated to pay 70/80 and Rule-of-65 retirement benefits to employees who are eligible as determined by their combined service with National and Weirton Steel Corporation. The amount of the regular pension component of the 70/80 or Rule-of-65 pension benefit would be calculated on the basis of earnings and service with National prior to the sale. However, National would pay the entire $400 monthly supplement. Benefits payable upon a shutdown of less than the entire plant during and after the five year period would be the sole responsibility of Weirton Steel Corporation, as would be such benefits payable upon a complete plant shutdown after the five year period.

In August, 1983, the Committee distributed to Division employees a "disclosure document" which provided a detailed summary of the terms of the sale, including the requirement that the pension and severance provisions be clarified by amendment to state that a sale would not be interpreted to constitute a permanent shutdown of the plant. On September 23, 1983 the membership of the Union voted overwhelmingly to ratify the clarifying amendments. Thereafter, National and the Union adopted such clarifying amendments to the Union pension agreements and Union severance provisions which stated, *inter alia*, that the sale of assets was not an event which would be interpreted to constitute a permanent shutdown of the plant or the absence of suitable long-term employment so as to make the sale an event which triggers any employee's

entitlement to receive 70/80 or Rule-of-65 pension benefits or severance payments. Pursuant to its agreement with the Committee as to non-union employees, National also adopted identical clarifying amendments to its salaried pension plan and severance policy.

The buyer, Weirton Steel Corporation, after negotiation with the Union, instituted a pension plan which included 70/80 and Rule-of-65 pension provisions, which provisions are the same as those which were contained in the National plan prior to the clarifying amendments. In addition, the same severance pay provisions as had existed with National prior to those amendments were included in Weirton Steel Corporation's new collective bargaining agreements with the Union. Non-union employees of Weirton Steel Corporation were made participants in the same pension plan as Union employees and were granted a severance policy identical to that which they had enjoyed with National.

The practical effect of these agreements, therefore, was that Weirton Steel Corporation undertook the obligation to pay 70/80 and Rule-of-65 retirement benefits and severance payments after the sale on the same basis as National had offered them prior to the sale. Moreover, National's obligation to pay 70/80 and Rule-of-65 pension benefits did not terminate with the sale. As already noted, in the event of a permanent shutdown of the entire plant within five years, National and its pension fund which is applicable to its former Weirton employees and retirees are obligated to pay the 70/80 and Rule-of-65 retirement benefits based upon a proration of service with National and with Weirton Steel Corporation. Thus, the pension and severance benefit provisions at issue remain in existence after the sale. No one has lost such benefits by virtue of the sale.

Petitioners nevertheless argue that the sale should have entitled them to immediate payment of such benefits by National. They want National to pay these benefits although they never lost a single day's work by virtue of the transfer of ownership, and although they continue to work for an acquiring corporation which has established identical benefit provisions.

The Petitioners claimed that, but for the above described clarifying amendments, a sale of the assets, regardless of continued employment with Weirton Steel Corporation, would have been a permanent shutdown of the plant and consequent loss of their employment. They further claimed that the sole motivation of National in selling the plant, under the terms of its agreement with the Committee, was to avoid future pension obligations represented by the 70/80 and Rule-of-65 contingent pension benefits which National would have incurred if it had continued to own the plant and had implemented its announced intention to reduce operations. They argued that, assuming such motivations, National violated its fiduciary duty as administrator of the pension plan by negotiating a sale under the terms described above. They argued further that National's actions violated ERISA provisions prohibiting certain transactions involving the assets of the plan.

The court of appeals assumed, for purposes of reviewing the grant of summary judgment by the district court, that the sole motivation of National in selling the plant was to avoid future pension obligations in the form of 70/80 and Rule-of-65 contingent pension benefits. Agreeing with the result reached by the district court, the court of appeals held that, even assuming such motivations, since the challenged amendments affected only contingent, forfeitable benefits, National's actions were not subject to

ERISA's fiduciary duty to act solely in the interests of plan participants.

As to the claim that the sale constituted a prohibited transaction under ERISA because plan "assets" were negotiated away in conjunction with the sale, the court of appeals rejected Petitioners' argument that a contingent liability for ancillary pension benefits is an asset of the plan within the meaning of §406 of ERISA, 29 U.S.C. §1106.

## REASONS FOR DENIAL OF THE WRIT

### A. THE WRIT SHOULD BE DENIED BECAUSE PETITIONERS' ARGUMENTS ARE BASED UPON FACTUAL ASSERTIONS CONTRARY TO THE FACTS FOUND BY THE LOWER COURTS.

The writ should be denied because Petitioners premise their arguments on factual assertions which are (a) contrary to the facts found by the district court on the basis of extensive testimony and evidence presented at the preliminary injunction hearings and (b) contrary to facts found by the court of appeals to have been unrefuted in proceedings before the district court. Specifically, the writ should be denied because Petitioners continue to rely herein, as they did before the courts below, upon the assertion that the Weirton Joint Study Committee, Inc., did not operate independently of National Steel Corporation in negotiations regarding the terms of the sale of the Division.

Petitioners in *Brunner* make this assertion obliquely in their argument that the lower court's finding that the Union did not breach its duty of fair representation is erroneous. They assert that the Union breached its duty of fair representation by allowing the Committee, which included five management members and twenty-four

Union members, to negotiate terms of sale with National. Based upon the testimony and evidence submitted at the preliminary injunction hearings, the district court held that the Union's role in the sale did not constitute a breach of its duty. The court of appeals likewise held that the evidence conclusively established the legality of the Union's actions. In addition, the General Counsel of the National Labor Relations Board refused to issue unfair labor practice complaints against either National or the Union based on Petitioners' contentions about the operation of the Committee. *See* Appendix A of this Brief.

The Petitioners in *Sutton* and *Dhayer* assert National negotiated "with itself," again basing this assertion on their characterization of the Committee's role in the sale process. Like that of the *Brunner* Petitioners, this argument is an attack on the district court's factual findings, which were based upon the testimony and exhibits Petitioners themselves generated at the preliminary injunction hearings. This argument is likewise contrary to the determinations made by the General Counsel of the NLRB in support of his decision not to issue a complaint based upon the same allegations.

Petitioners press these previously rejected assertions here in an attempt to avoid the consequences of this Court's holding in *United Mine Workers of America Health and Retirement Funds v. Robinson*, 455 U.S. 562 (1982), where this Court held unequivocally that "when neither the collective bargaining process nor its end product violates any command of Congress," 455 U.S. at 576, the actions of an employer negotiating changes in retirement benefits are not subject to scrutiny under ERISA's fiduciary standards. *See* Section B, *infra*. However, the Petitions show nothing which would warrant this Court's review of the findings the district court made and

the court of appeals affirmed as to the operation of the Committee. Consequently, certiorari should be denied.

## B. THE COURT OF APPEALS CORRECTLY RELIED UPON *UNITED MINE WORKERS OF AMERICA HEALTH AND RETIREMENT FUNDS V. ROBINSON.*

The decision of this court in *United Mine Workers of America Health and Retirement Funds v. Robinson, supra,* is controlling as to the ERISA issues presented for review. *Robinson* holds that negotiated changes in benefit plans are not to be reviewed under the fiduciary standards that would be applicable to review of actions of trustees in administering a fund: so long as the employer's actions in seeking and adopting changes in such plans do not violate either the terms of the plan or the terms of a separate trust instrument, and so long as the end product does not violate ERISA, courts should not interfere with an employer's right to adjust the level of benefits or the eligibility requirements for those beneifts.

Petitioners have attempted to distinguish *Robinson* both by attacking the negotiating process which resulted in the clarifying amendments and by focusing on what they characterize as the "unique circumstances" of those negotiations. Petitioners in *Dhayer* argue further that they are not members of any bargaining unit represented by the Union and, therefore, the Union (or the Committee) was not obliged to protect their interests during the negotiations culminating in the sale. However, these attempts to distinguish *Robinson* are unavailing in raising any questions worthy of review by this Court.

We have already noted that Petitioners' allegations as to the process of negotiation leading up to the terms of sale have been thoroughly explored and resolved adversely to

Petitioners by both courts below, as well as by the General Counsel of the NLRB. Certiorari is not warranted in order merely to review these determinations.

Moreover, an analysis of the salient facts and issues involved in *Robinson* indicates that the remaining "distinctions" drawn by Petitioners here do not take the present case outside of *Robinson's* rationale and holding. More specifically, Petitioners' allegations that National "coerced" Weirton employees at the eleventh hour and that the Committee could not fairly represent salaried employees such as the *Dhayer* Petitioners because neither the Committee nor the Union owed any particular legal duty to them are directly analagous to certain arguments in *Robinson* which this Court mentioned but found not to affect the holding.

The *Dhayer* Petitioners, for example, are no different from the plaintiffs in *Robinson*, insofar as both groups were represented in negotiations by parties which had no legal duty or obligation to do so. That is, the plaintiffs in *Robinson* were not members of a bargaining unit represented by the UMW; they were, rather, widows of coal miners. The union owed them no duty of fair representation. Yet this Court found nothing impermissible in the consequences of the union's actions affecting these plaintiffs under the collective bargaining agreement negotiated between the employers and the UMW. 455 U.S. at 574-575, citing *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 181 n. 20 (1971).

In the present cases, it must be assumed either that the *Dhayer* Petitioners were represented on the Committee by members of Division management or that they were represented by the Union itself, insofar as National's negotiations with the Union "set the pattern" for clarifying

amendments which applied uniformly to all Division employees. In either case, the absence of a legal duty owed to the *Dhayer* Petitioners by their bargaining representatives affords no ground for their attempt to avoid the controlling affect of this Court's decision in *Robinson.*

Furthermore, the collective bargaining agreement provisions of which the plaintiffs complained in *Robinson* were the result of an "eleventh hour" package proposed by the employers—after a strike by the union had already begun—and were directly contrary to demands made by the union throughout the negotiations. The union received no separately identifiable *quid pro quo* for relinquishing these demands. 455 U.S. at 567. These circumstances in *Robinson* certainly are analagous to those elements of the present case which the Petitioners wrongly characterize as eleventh hour economic coercion by National. Therefore, their effort to distinguish *Robinson* on the basis of the "unique circumstances" surrounding the negotiations between National and the Committee must fail.

In short, the distinctions which Petitioners seek to draw are both legally insignificant and insufficient to remove the instant case from *Robinson's* reach. More importantly, Petitioners fundamentally misconstrue and distort the fiduciary standards imposed by ERISA when they argue that those standards must reach an employer's decision as to the level of benefits it will provide and the contingencies under which it will provide them. This Court has recognized a clear distinction between the duties of an employer acting *qua* employer in setting (or negotiating for) the terms of an employee benefits plan and an employer acting as a fiduciary in administering a plan in accordance with its terms. *See National Labor Relations Board v. Amax Coal Company,* 453 U.S. 322 (1981). Administration of a plan is not collective bargaining. *Id.* at

337 n. 21. Where an employer is a fiduciary by virtue of its designation as administrator of a plan, fiduciary duties attach only to its administration of the plan and plan assets—not to all other actions it takes regarding the plan. *See Chicago Board of Options Exchange vs. Connecticut General Life Insurance*, 713 F.2d 254 (7th Cir. 1983); *Schulist vs. Blue Cross of Iowa*, 717 F.2d 1127 (7th Cir. 1983); *UAW District 65 vs. Harper & Row, Inc.*, 576 F. Supp. 1468 (S.D.N.Y. 1983); *see also*, ERISA, 3(21)(a), 29 U.S.C. §1102(21)(a).

This is not to say that an employer is absolutely free to amend or modify a plan without attention to the requirements of ERISA. ERISA's vesting requirements and similar provisions act as legal constraints, as where an employer would attempt to cause a forfeiture of vested, accrued benefits. However, when a plan amendment does violate such specific requirements it is unlawful by reason of its failure to conform to a specific stricture of ERISA, not by reason of the employer's violation of its fiduciary duty as administrator of the plan. Indeed, an employer's fiduciary status is wholly irrelevant to the question of whether a violation has occurred in such circumstances.

In summary, therefore, Petitioners have failed to present any plausible, much less convincing, arguments in support of their contention that the courts below have misplaced their reliance on *Robinson*. The court of appeals broke no new legal ground in holding that fiduciary standards do not apply in the circumstances of the negotiated sale of a plant. Accordingly, certiorari should be denied.

### C. THE COURT OF APPEALS CORRECTLY HELD THAT THE SALE DID NOT INVOLVE A PROHIBITED TRANSACTION UNDER ERISA.

Petitioners failed to convince either of the courts below that the challenged actions with respect to the con-

tingent pension and severance benefits constituted a prohibited transaction within the meaning of section 406(a) or (b) of ERISA, 29 U.S.C. §1106(a), (b). In order to bolster their inherently implausible reading of the Act, Petitioners submitted an affidavit by an actuary who suggests that it would be prudent for National to consider these potential contingent liabilities arising from a possible future plant shutdown as an "asset" of the pension fund.[5] On the strength of this affidavit, Petitioners have argued that a question of fact exists as to whether any attempt on National's part to relieve itself of liability for payment of such contingent benefits would be prohibited self-dealing with the assets of the plan.

Petitioners have thus urged the courts to adopt a definition of the term "assets" which is so radical that its adoption would give rise to enormous uncertainty and confusion. The court of appeals properly rejected such a strained and specious interpretation of the term "assets" as used in ERISA, stating that "the actuary's opinion is not proof that National's contingent liability is an asset of the plan within the meaning of ERISA." *Sutton* Appendix at 8a.

Petitioners have pointed to no evidence that Congress ever intended to give the term "assets" a tortuous or unusual meaning for the purposes of ERISA. In the absence of compelling evidence to the contrary, such terms should be given their usual and customary meaning. *Aaron v. Securities & Exchange Commission,* 446 U.S. 680 (1980).

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[5]In their brief to this Court, Petitioners in *Sutton* and *Dhayer* stated that the actuary in question, Daniel Kass, was with the firm of Towers, Perrin, Forster & Crosby (T,P,F&C), the same firm which had advised the Committee. Petitioners' Brief, p. 9. That statement was incorrect. Mr. Kass' affidavit, set forth at pages 121a-122a of the *Sutton* Appendix, indicates that he is associated with Kass, Germain & Company.

Furthermore, as the court of appeals found, in amending the pension plan and severance policy, National did not "cause the plan to engage in a transaction" as that term is used in section 406(a) of the Act, 29 U.S.C. §1106(a). There has been no evidence whatsoever that the pension plan was caused to engage in any sort of transaction in connection with the sale of the Weirton Division. The plan itself played no role in the sale transaction. It did not buy, sell, exchange, transfer, loan, guarantee, furnish or acquire anything, and, as the court of appeals stated, "[n]o funds held by the pension plan will be depleted or recouped by the company because of the agreement not to trigger the contingent benefits." *Sutton* Appendix at 8a. In short, section 406(a) is on its face totally inapplicable to the sale.

Petitioners' attempt to concoct an argument that a prohibited transaction has occurred is sheer bootstrapping. The plain language of the statute itself stands as an insurmountable barrier to Petitioners' theory. That theory was properly rejected by the courts below. It is not worthy of further consideration by this Court.

## CONCLUSION

For all of the foregoing reasons, the Petitions for Writ of Certiorari in the *Brunner*, *Sutton* and *Dhayer* actions should be denied.

Respectfully submitted,

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# APPENDIX A

# NATIONAL LABOR RELATIONS BOARD

## OFFICE OF THE GENERAL COUNSEL

Washington, D.C. 20570

August 11, 1983

Re: Weirton Steel Div.,
National Steel
Corporation
Case No. 6-CA-16296

Independent
Steelworkers Union
(Weirton Steel Div.)
Case No. 6-CB-6012

Anthony P. Sgambatti II, Esq.
Michael Morley, Esq.
P.O. Box 849
Youngstown, Ohio 44501

Gentlemen:

Your appeal from the Regional Director's refusal to issue complaint in the above-captioned matter has been duly considered.

The appeal is denied substantially for the reasons set forth in the Regional Director's letter of July 12, 1983. After a thorough review of all the evidence disclosed during the Regional investigation and contentions raised on appeal, it was concluded that a violation of the National Labor Relations Act could not be established. Accordingly, further proceedings herein were deemed unwarranted.

Very truly yours,

William A. Lubbers
General Counsel

By /s/ MARY M. SHANKLIN
Mary M. Shanklin
Director, Office
of Appeals

cc: Director, Region 6
Mr. Richard Arango, 105 Arango St., Weirton, West Virginia 26062
Independent Steelworkers Union, 2971 W. St., West Virginia
Peter R. Rich, Esq., Bogard S. Robertson, 3147 W. St., Weirton, West Virginia 26062
Weirton Steel Div., National Steel Corp., 3 Springs Dr., Weirton, West Virginia 26062

# NATIONAL LABOR RELATIONS BOARD

## REGION 6

1502 William S. Moorhead Federal Building,
1000 Liberty Avenue

Pittsburgh, PA 15222

July 12, 1983

Re: Weirton Steel Div.,
National Steel
Corporation
Case No. 6-CA-16296

Independent
Steelworkers Union
(Weirton Steel Division)
Case No. 6-CB-6012

Anthony P. Sgambati, Esquire
P.O. Box 849
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Youngstown, Ohio 44501

Dear Mr. Sgambati:

The above-captioned cases alleging a violation of Section 8(a)(1) and (2) and Section 8(b)(1)(A) of the National Labor Relations Act, as amended, have been carefully investigated and considered.

As to the allegations that the Employer violated Section 8(a)(1) and (2) of the Act by the participation of management representatives on a joint study committee created to examine the feasibility of an employee stock ownership plan (ESOP), the investigation disclosed that the Joint Study Committee (JSC) consists of representatives of management at the Weirton Steel Division as well as representatives of the charged union and an independent guards'

union which separately represent employees at the facility. The management representatives on the JSC do not have voting control of committee actions inasmuch as they do not constitute a majority of committee members. Further, the investigation failed to establish that the management representatives on the JSC are representing the interests of National Steel Corporation rather than the interests of their fellow management employees at the Weirton Steel Division who would become the management employees of the new employee-owned facility should the ESOP plan be successful. Thus, there appears to be insuffient evidence to establish that the Employer has dominated or interfered with the administration of the Union in violation of Section 8(a)(2) of the Act.

With respect to the allegation that the Charged Union violated its duty of fair representation toward employees by agreeing to certain concessions with National Steel in an effort to make the ESOP plan feasible, the investigation disclosed no evidence that any decisions by the charged union relating to contractual concessions were made in an arbitrary fashion or in bad faith. It is noted that, for example, the Union negotiated a safety net for pension rights whereby National Steel Corporation would remain liable for pensions of retirees of the employee-owned facility should the facility cease operations within 5 years of the ESOP plan becoming implemented. The investigation further failed to disclose evidence that any of the compromises made by the Union in negotiations were not made in good faith.

With respect to the allegation that the Union could not legally negotiate with the proposed new entity concerning the working conditions of the future employees of the employee-owned facility due to a lack of representative status under Section 9(a) of the Act, the investigation dis-

closed that as the purpose of the ESOP is to guarantee continued employment for as many current employees as possible, and as the prospective employer is being created pursuant to a plan to retain all of the unit employees now employed in the Weirton Division, it is under an obligation to negotiate with the Union relating to the working conditions of the employees to be retained. *N.L.R.B.* v. *Burns International Security Services*, 406 U.S. 272, 294, 295 (1972). Under these circumstances, the Union does not violate Section 8(b)(1)(A) of the Act by negotiating with the prospective employer regarding the conditions to be enjoyed by employees once the ESOP goes into effect.

As to the allegation that the Union violated Section 8(b)(1)(A) of the Act because of a conflict of interest in that, should the ESOP plan be implemented, two members of the Board of Directors of the new entity will be appointed by the Union, it is noted that the two Union representatives will not constitute a majority or controlling interest on the Board of Directors. Further, in order to establish a violation of the Act in this regard, it must be shown that there is an actual, rather than potential, conflict of interest in having Union representatives serve on a corporate Board of Directors. No such actual conflict of interest has been demonstrated herein. It is further noted that all agreements arising out of the ESOP plan are subject to ratification by the unit employees prior to their implementation. Based on the current structure of the ESOP plan and the evidence adduced during the investigation, it does not appear that the presence of the two Union representatives on the Board of Directors constitutes a violation of the Act.

The charge further alleges that the Union violated Section 8(b)(1)(A) of the Act by its failure to process grievances. The investigation disclosed that although two Union stew-

ards may have informed an employee that grievances would not be processed from a certain point in time, nevertheless grievances have been accepted and processed by the Union without interruption. The investigation disclosed no evidence that the Union at any time refused to accept or process grievances filed by its members. Assuming, *arguendo*, that the statements attributed to the two stewards were in fact made to the employee, this misinformation has been effectively corrected by the action of the Union in continuing to process grievances in an appropriate manner. Accordingly, there is insufficient evidence to warrant proceeding on this allegation. In view of the foregoing, further proceedings do not appear warranted, and I am refusing to issue Complaint in this matter.

If you file an appeal, please complete the notice forms enclosed with the attached letter and send one copy of the form to each of the other parties whose names and addresses are listed. The notice forms should be mailed at the same time you file the appeal, but mailing the notice forms does not relieve you of the necessity for filing the appeal itself with the General Counsel and a copy of the appeal to me within the time stated above.

Very truly yours,

/s/ GERALD KOBELL

Gerald Kobell
Regional Director

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

cs

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